

Missouri Towing & Barge, Inc. and Martin Phillips.
Case 14-CA-14239

July 24, 1981

DECISION AND ORDER

On February 13, 1981, Administrative Law Judge Hubert E. Lott issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief and Respondent filed an answering brief.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

¹ The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

² Inasmuch as we conclude that Martin Phillips was not engaged in protected activity when he knowingly filed a false workmen's compensation claim, we find it unnecessary to consider the relevance, if any, of Respondent's "reasonable belief" that the claim was false.

DECISION

STATEMENT OF THE CASE

HUBERT E. LOTT, Administrative Law Judge: This case was heard in St. Louis, Missouri, on December 8, 1980, upon an unfair labor practice charge filed on September 12, 1980, by Martin Phillips, an individual, against Missouri Towing and Barge, Inc., Respondent, and upon a complaint issued by the General Counsel on October 10, 1980. The issue in the case is whether Respondent on or about May 12, 1980, failed and refused to reinstate the Charging Party to work because he filed a workmen's compensation claim with the State of Missouri,¹ in violation of Section 8(a)(1) of the National Labor Relations Act.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due considera-

tion of the briefs filed by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company, a Missouri corporation, is engaged in the business of cleaning and repairing river barges at its place of business located at St. Louis, Missouri, where it annually purchases and receives goods and materials valued in excess of \$50,000 directly from customers located outside the State of Missouri. The company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The General Counsel contends that Martin Phillips was refused reinstatement on or about May 12, 1980, because he filed a workmen's compensation claim. Respondent while admitting that it refused reinstatement to Phillips contends that it did so because he knowingly filed a false or fraudulent workmen's compensation claim.

Martin Phillips was employed by Respondent since May 1979² as a barge cleaner, and his duties consisted of sweeping, cleaning, and washing barges. Phillips' last day of work was Sunday, December 9. On that day he was working with another employee named John Penrod and Supervisor Paul Hassler. He and Penrod were closing cover settings on the barges in addition to filling, lifting, and hauling grain sacks which weighed between 50 and 100 pounds each. Toward the end of the day Phillips testified that he complained to Hassler and Penrod about his back hurting. He told Hassler that his back hurt so bad that he could not carry the last bag of grain to be moved. However, he completed the workday which ended at 4:30 p.m. and went home. Prior to leaving work he asked Penrod and Hassler if their would be work for the next day. On Monday morning, December 10, Phillips testified that he experienced back pain. On Tuesday, December 11, he called Dan Rudanovich, the Respondent's vice president, who referred Phillips to Thomas Rollins, Respondent's president. Rollins told Phillips to come in to work. Phillips reported to Rollins office on that Tuesday and explained that he had hurt his back working on Sunday, December 9. Rollins made an appointment for Phillips to see the company doctor and said nothing further. Phillips further testified that sometime in December he had a conversation with Rudanovich in the vice president's office. The conversation concerned Phillips filing for workmen's compensation. Rudanovich is alleged to have recommended that Phillips not file a claim because he did not believe that Phillips hurt his back at work. He suggested that Phillips go home and think about it and call him back. Phillips responded by saying that he had hurt his back at work. Phillips filed a workmen's compensation claim under the Longshoremen's Act in late December or early January

¹ At the hearing the General Counsel amended the complaint, pars. 4(B) and (E) to reflect that the Charging Party filed a workmen's compensation claim with the U.S. Department of Labor, Employment Standards Administration, Office of Workers Compensation Program, instead of with the State of Missouri.

² All dates are in 1979 unless otherwise stated.

1980 and was treated by the company doctor from December until May 1980. On May 12, 1980, Phillips was released for full duty by the doctor. He took the release to Rudanovich who explained that there was no work at present because things were slow. Since May 12, 1980, Phillips has called Respondent's office two or three times, and on each occasion he was informed that no work was available. On cross-examination Phillips admitted that he was aware of the Company's policy requiring employees to report injuries as soon as they occur, and that he had done this in September when he had sustained an injury. However, he did not report any injury on December 9. He further admitted that on December 9 he and his roommate, Mike Laird, were in the process of moving some furniture in their apartment, but denied lifting any furniture. Phillips admitted that Debbie Penrod, the wife of John Penrod, has been a friend of his for some 10 or 12 years, but he denied ever telling her that he hurt his back moving furniture or ever discussing the matter with her. Finally, Phillips admitted that while he was off work with his back injury Thomas Rollins repeatedly told him that there was a question as to whether his injury was work related and that they were leaving it in the hands of the insurance company. He further stated that the insurance company was contesting his claim and intended to litigate the matter because the injury was not work related.

Thomas Rollins testified that he has been president of the Company since its incorporation in March 1977. The Company employs from between 15 to 18 full-time employees and from 15 to 25 part-time employees in the spring and summer and to 5 to 10 part-time employees during the winter. The basic duties of Respondent's employees consist of sweeping the bottom floor of the barges and removing the grain and grain products by buckets, welding, and repair operations and fiberglass repairs. He testified that numerous injuries have occurred to employees because of the nature of the work and that since 1977 between 25 and 35 workmen's compensation claims have been filed for injuries incurred while working for the Company. The majority of the injuries consist of smashed fingers, toes, back strain, cuts, and bruises. Insurance benefits have been paid to some of these employees and he further stated that he has never told any employee not to file a workmen's compensation claim. Rollins further testified that he has never refused to take an employee back to work because they filed a claim or received benefits for injuries. The Company has a strict procedure for recording injuries. This procedure is posted in the employee crew room and requires that injuries be reported immediately and that a written report be made of the injury by the injured party or a supervisor and that this report be signed by a witness. Rollins testified that, after Rudanovich informed him of Phillips' injury, he contacted Phillips by telephone to find out what had happened. Phillips complained of lower back pain and thought he had hurt his back lifting a grain bag. Rollins had no reason to disbelieve him at this point; however, he did mention to Phillips that he had not filled out an accident report or told Hassler or Penrod about the injury. Rollins then informed Phillips that he had an appointment with the company doctor for

Wednesday morning. On Tuesday, December 11, Rudanovich told Rollins that Phillips may have sustained his back injury while moving furniture at home. This was reported to Rudanovich by Paul Hassler. Rollins in turn reported this information to the insurance carrier and asked that it pay particular attention to the claim. According to Rollins within the next day or two Phillips informed him that he had been examined by the company doctor who informed him that he had sustained lower back strain and would be out of work for some time. Rollins told Phillips that the insurance broker had been alerted and that they were to assign an insurance adjuster to investigate his claim. After being alerted about the questionable nature of Phillips' claim by Rudanovich, Rollins talked with Hassler and Penrod in Rudanovich's office on that Tuesday. He explained to them that Phillips claimed that he had hurt his back at work lifting a bag of grain on Sunday. Penrod stated that he had worked with Phillips all day Sunday and that Phillips had made no report of injury. He further told Rollins that Phillips had talked to his wife on Monday and told her that he had hurt his back moving furniture and that he was surprised that Phillips now claimed to have hurt his back at work. On that same day Rollins called Penrod's wife with Rudanovich listening in on the telephone. Penrod told them she had had a conversation with Phillips and he told her he had injured his back moving furniture on Sunday. She stated that she was a personal friend of Phillips and inquired as to his condition. Phillips said he was not scheduled to see a doctor until the next day. Rollins received a telephone call from Phillips on January 30, 1980, wanting to know the status of his workmen's compensation claim. Rollins informed him that it had been turned over to an investigator. At another time in January 1980 Rollins told Phillips there was a question as to whether the injury occurred on the job and that it would be up to the insurance company to determine whether this was a compensable claim. On February 20, 1980, Respondent received a workmen's compensation claim filed by Phillips with the U.S. Department of Labor Employment Standards Administration. Sometime thereafter Respondent's insurance company notified Rollins that, after investigation, they were denying Phillips' claim in its entirety and had closed the file.

Dan Rudanovich, Respondent's vice president, testified that he received a telephone call from Phillips on the morning of December 10. Phillips informed him at that time that he had injured his back the previous day. That same afternoon Rudanovich questioned Paul Hassler about Phillips' injury on Sunday. He questioned Hassler as to why an injury report had not been filled out on Phillips and why he had not been informed about the accident when they talked earlier that morning. Hassler said that he was not aware that Phillips had injured himself on Sunday. On Tuesday morning Hassler informed Rudanovich about the conversation between John Penrod's wife and Phillips to the effect that Phillips had injured his back while moving furniture at home. Rudanovich further testified that during the week of December 17 he asked Phillips to come to the office which

he did. Upon arrival Rudanovich told Phillips that there was a question as to whether he had injured his back at work or moving furniture and that, if he falsified a claim against the Company, problems could develop.

Paul Nassler, Respondent's maintenance supervisor, testified that the reporting procedure involving injuries was the same as described above by Rollins. He further stated that in the past he had filed a workmen's compensation claim for injury and was paid benefits. He supervised Phillips and Penrod on December 9 and spoke to them several times during that day. At no time during that day did Phillips complain of a back injury. He talked to Phillips at the end of the workday and Phillips asked him if there were any work for the next day, and Hassler said no. Phillips did not mention a back problem and when he walked away he did not appear to be hurt. Monday afternoon Rudanovich told Hassler that Phillips had said he hurt his back on the job. Hassler said that there was no report of injury on Sunday, and "it was news to him." On Tuesday, December 11, Hassler rode to work with Penrod and that is when Penrod related the conversation to Hassler that took place between Phillips and Penrod's wife on Monday wherein Phillips told Penrod's wife that he had hurt his back moving. ¶131 John Penrod testified that he has been injured three or four times at work, that he has been absent from work with injuries, and that he filed workmen's compensation claims, and received benefits several times. Penrod further testified that he worked with Phillips all day on December 9 and that Phillips never complained about his back hurting and never said he could not carry any more bags of grain. Penrod stated that on the evening of December 10 his wife told him that Phillips had called her earlier that morning and, during the course of that conversation, Phillips said that he had been moving boxes at the apartment and hurt his back.

Debbie Penrod, the wife of John Penrod, testified that she has known Martin Phillips for 10 or 12 years and he calls her on the telephone an average of two or three times a week. She testified that Phillips called her on the morning of December 10 and told her among other things that he had been carrying boxes and "stuff" upstairs and had hurt his back. She in turn repeated this conversation to her husband that same evening. She further testified that on Tuesday, December 11, Rollins and Rudanovich called her on the telephone about Phillips and she relayed the conversation she had with Phillips to them.

III. ANALYSIS AND CONCLUSIONS

After carefully considering both the demeanor and substantive testimony of Martin Phillips as opposed to the testimony of Thomas Rollins, Dan Rudanovich, Paul Hassler, John Penrod, and Debbie Penrod, I must credit the testimony of Respondent's witnesses over that of Phillips' uncorroborated testimony. These credibility resolutions are based not only on the demeanor of the witnesses but also on the fact that Respondent's witnesses presented more convincing and mutually corroborative evidence. Therefore I find that Phillips did not complain about his back hurting on Sunday, December 9, to anyone. I further find that he did ask Hassler at the con-

clusion of the workday whether or not there would be work the next day. I also find that Phillips did call Debbie Penrod on Monday morning, December 10, and complained about hurting his back moving boxes or furniture in his apartment and that this information was conveyed back to Rollins and Rudanovich.

Based on the credited testimony in this case, I find that Respondent did not refuse to reinstate Phillips because he filed a workmen's compensation claim, but rather because it believed he knowingly filed a false claim. This fact was known to Respondent and was the basis for its decision. Respondent presented unrefuted evidence that over the years many employees, including two witnesses in this case, have been injured, filed workmen's compensation claims, and received benefits without ever having been discriminated against or having been told by Respondent not to file a claim.

The General Counsel argues in her brief that, since animus is not a factor in this case, all that need be proved is that Phillips filed a workmen's compensation claim and was refused reinstatement because of it. The General Counsel thus makes the assumption that the mere filing of a claim and Respondent's action in refusing reinstatement give rise to a violation, regardless of what the claimant did. In my view the conduct of Phillips must be separated from his act of filing a workmen's compensation claim. When viewed in this context, Phillips' conduct, which appears to border on dishonesty affecting his employment relationship, gave Respondent reasonable cause to terminate his employment, notwithstanding the fact that he filed a workmen's compensation claim. Furthermore, the General Counsel's argument also suggests that motive need not be proved. I can understand why the General Counsel advances this argument, but I do not agree with it. In this case motive is important and I fail to see where it has been established by a preponderance of the evidence that Respondent terminated Phillips' employment because he filed a workmen's compensation claim. The only evidence that even suggests an unlawful motive relates to the conversation between Rudanovich and Phillips, wherein Rudanovich told Phillips that there was a question as to whether he injured his back at work or in his apartment moving furniture, and that if he falsified a claim against the Company, problems could develop.³ It seems clear to me that Rudanovich was addressing himself to Phillips' conduct as opposed to the mere filing of the workmen's compensation claim.

Accordingly, I find that the General Counsel has not established by a preponderance of the credible evidence in this record that Respondent has violated Section 8(a)(1) of the Act. I further find that Respondent reasonably believed that Phillips knowingly filed a false workmen's compensation claim under the Longshoremen's and Harbor Workers Compensation Act with the U.S. Department of Labor, Employment Standards Administration, Office of Workers Compensation Program, and refused to reinstate him for that reason.

³ I credit Rudanovich's version of the conversation although both versions are similar.

CONCLUSIONS OF LAW

1. Respondent Missouri Towing and Barge, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent has not engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act as alleged in the complaint herein.

Upon the foregoing findings of fact and conclusions of law and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER⁴

It is hereby ordered that the complaint be, and it hereby is, dismissed in its entirety.

⁴ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.